In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1130

MELVIN FRIEDMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the showing of intent sufficient to establish a substantive violation of the federal obscenity statute is insufficient in a prosecution for conspiracy to violate that statute, and (2) that because several of the overt acts charged were allegedly protected First Amendment activities and the convictions required proof of only one overt act, the convictions violate the First Amendment.

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners Friedman, Mitchum, Fishman, and Boyd were convicted of having knowingly conspired to transport in the United States mail

obscene literature (18 U.S.C. 1465 and 2), in violation of 18 U.S.C. 371. Petitioners were sentenced as follows: Friedman - 42 months' imprisonment (30 days incarceration with the balance on probation) and a $5,000 fine; Fishman - 36 months' imprisonment (15 days incarceration with the balance on probation) and a $2,500 fine; Mitchum - 36 months' imprisonment (15 days incarceration with the balance on probation) and a $1,500 fine; Boyd - 30 months' imprisonment (15 days incarceration with the balance on probation) and a $1,500 fine. Petitioner Sooner State News Agency was convicted on two counts of having violated 18 U.S.C. 1465 and 2, and was fined a total of $5,000. The court of appeals affirmed the convictions (Pet. App. A).

The evidence at trial related to several sexually oriented book distributing corporations and retail bookstores, including Sooner State News Agency, Inc. of Tulsa, Oklahoma, All Star News Agency, Inc. of St. Louis, Missouri, and Paris Bookstall, Inc., doing business as Books Limited Numbers 1 and 2 of Little Rock, Arkansas. The corporations had overlapping directorates and officers and were essentially one business under the direction of Peachtree National Distributors, Inc. of Atlanta, Georgia, whose warehouse contained large numbers of sexually oriented books, magazines, newspapers, films, novelty items, and movie machines, with "hard core" pornography stored in a special locked area (Tr. 146, 192, 226-227). The bank statements of several of the subsidiary corporations were mailed directly to the Atlanta headquarters office (Tr. 62, 63, 66, 76, 77, 80, 85, 86, 89) and several employees of the subsidiaries were paid from a consolidated payroll account in Atlanta (Tr. 70-74).

From February, 1971 to February, 1973, petitioners opened or purchased five bookstores in Arkansas (Tr. 129, 131, 162, 189, 195, 198). All of the bookstores dealt ex-

clusively with sexually-oriented books, magazines, movies, and novelties (Tr. 129, 134, 189, 234), which were supplied exclusively from Peachtree National Distributors, All Star News Agency, and Sooner State News Agency (Tr. 130, 191, 196).

Books Limited Numbers 1 and 2 were retail bookstores originally stocked exclusively with sexually oriented material obtained through petitioner Fishman and shipped from All Star News Agency, the St. Louis subsidiary (Tr. 128, 130).

On July 6 and 12, 1972, Sooner State News Agency mailed obscene printed materials from Tulsa, Oklahoma, to Books Limited Number 2 in Little Rock, Arkansas (Tr. 293-295, 389-392). On February 15, 1973, Peachtree Discount Distributors, also a subsidiary of Peachtree National Distributors, mailed obscene material from Atlanta, Georgia, to Books Limited Number 1 in Little Rock (Tr. 399-401). The material thus shipped, which was introduced in evidence, contained photographs of men and women participating in numerous sex acts, including sexual intercourse with penetration, anal intercourse, fellatio, cunnilingus, and masturbation. These shipments, alleged as overt acts in the conspiracy charged against the individual petitioners, were part of a plan described by petitioners Friedman and Fishman first to introduce "soft" and then "hard core" pornography into the several retail bookstores controlled from the Atlanta, Georgia, headquarters (Tr. 237-239).

Petitioner Friedman was president of Peachtree National Distributors (Tr. 59), director and secretary-treasurer of All Star News Agency (Tr. 75-76), and secretary of Sooner State News Agency (Tr. 79, 81). Petitioner Mitchum was president of All Star News Agency (Tr. 74-75), Sooner State News Agency (Tr. 79), and Paris Bookstall, Inc. (Tr. 85, 98). Petitioner Boyd was manager of the two Books

Limited bookstores in Little Rock (Tr. 85, 91, 98-99, 283-284, 286), hiring employees and visiting the stores almost daily (Tr. 283, 285, 286, 291). Petitioner Fishman was an employee of Peachtree National Distributors and helped to establish bookstores in Hot Springs and the two Books Limited stores in Little Rock (Tr. 127-129, 133, 168, 185-186, 189, 193).

1. Petitioners contend that the intent requirement in a prosecution for conspiracy to violate 18 U.S.C. 1465 necessitates proof of their knowledge of the legally-obscene status of the material. Petitioners concede, as they must, that the government's proof of intent is sufficient to sustain a conviction for a substantive violation of federal obscenity statutes if it shows that petitioners had knowledge of the nature and content of the materials (Pet. 13). *Hamling* v. *United States*, 418 U.S. 87, 119-124.[1] Petitioners nevertheless contend that proof of their knowledge that the materials are legally obscene is required in a conspiracy prosecution.[2] Petitioners proffer no sound basis for their distinction between conspiracy and substantive obscenity

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[1]Petitioners argue that a conspiracy prosecution requires proof of specific intent whereas a prosecution for a substantive violation of an obscenity statute does not (Pet. 12). Contrary to this assertion, however, proof of specific intent is required in either case. As this Court held in *Hamling*, specific intent is established by proof of knowledge of the character of the materials alleged to be obscene. 418 U.S. at 123.

[2]Indeed, although the Court in *Hamling* expressly addressed the question whether proof that the defendant knew the materials were obscene was required in a prosecution under 18 U.S.C. 1461, the petitioners therein were convicted of conspiracy and substantive offenses. The instructions challenged in *Hamling*, in particular the instruction that the petitioners' "belief as to the obscenity or non-obscenity of the material [was] irrelevant" (418 U.S. at 120), were generally applicable. Thus, while the Court in *Hamling* was not confronted with the issue as petitioners here have framed it, the decision necessarily related to the challenge to instructions applicable to both conspiracy and substantive offenses.

offenses. See, *United States* v. *Mauro*, 501 F.2d 45, 51 (C.A. 2); *United States* v. *Bufalino*, 285 F.2d 408, 416 (C.A. 2). *Cf. United States v. Feola, No. 73-1123, decided* March 19, 1975, slip op. at 14-24.[3] Thus the court of appeals correctly held that sufficient evidence was introduced to support the jury's conclusion that the petitioners were aware of the nature and contents of the material which they agreed to transport by mail (Pet. App. A 10) and therefore acted with the necessary criminal intent.

2. Petitioners also argue that the prosecution was constitutionally impermissible because several of the alleged overt acts, such as incorporating book distribution firms, were presumptively activities protected by the First Amendment, and only one overt act was required for conviction. Petitioners argue that an overt act involving protected First Amendment activity cannot support a conviction, because permitting such conviction would chill the exercise of First Amendment freedoms.

In a prosecution for conspiracy, however, the overt act itself need not be criminal, since its function is "simply to manifest 'that the conspiracy is at work.' " *Yates* v. *United States*, 354 U.S. 298, 334 (citing *Carlson* v. *United States*, 187 F.2d 366, 370 (C.A. 10)). See, also, *Braverman* v. *United States*, 317 U.S. 49, 53. Petitioners concede as much, but contend that a conspiracy prosecution relying upon such overt acts represents an unconstitutional application of the statute. This contention is, as the court of appeals recognized (Pet. App. A 8), but another way of arguing that obscenity is protected by the First Amendment.

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[3]The question "whether it is fair to punish parties to an agreement to engage intentionally in apparently innocent conduct where the unintended result of engaging in that conduct is the violation of a criminal statute" (*id.* at 19) was not presented in *Feola* and is not presented here. The character and nature of the materials here, found to be obscene, refutes the claim of "apparently innocent conduct," the "unintended result" of which is violation of a criminal statute.

Miller v. *California*, 413 U.S. 15, 23; *Roth* v. *United States*, 354 U.S. 476, 485.

Petitioners were prosecuted, not for having engaged in activities protected by the First Amendment, but for having agreed to use the mails to transport obscene materials, a non-protected activity. As part of this conspiracy, they engaged in certain activities which, standing alone, were not criminal. This does not foreclose the proof of such activities "simply to manifest 'that the conspiracy is at work' ". *Yates* v. *United States*, *supra*, 354 U.S. at 334.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

DOJ-1975-05